

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTBORO CONDOMINIUM
ASSOCIATION,

Plaintiff,

v.

COUNTRY CASUALTY INSURANCE
COMPANY, COUNTRY MUTUAL
INSURANCE COMPANY, EAGLE WEST
INSURANCE COMPANY, and DOE
INSURANCE COMPANIES 1-10,

Defendants.

No. 2:21-cv-00685-BJR

**ORDER RE: (1) PLAINTIFF'S
MOTIONS IN LIMINE; AND (2)
DEFENDANT'S MOTIONS IN
LIMINE**

I. INTRODUCTION

This lawsuit is an insurance coverage dispute, between the Westboro Condominium Association ("Plaintiff" or "Westboro") and Defendants Country Casualty Insurance Company and Country Mutual Insurance Company ("Defendants" or "Country"), relating to certain water damage at a condominium in Federal Way, Washington (the "Condominium"). A jury trial in this matter is scheduled to begin on February 17, 2023. Presently before the Court are six motions in limine filed by Plaintiff ("Pl. Mot.," Dkt. No. 54), and six motions in limine filed by Defendants ("Def. Mot.," Dkt. No. 52). Plaintiff and Defendants have filed briefs opposing each other's motions (Dkt. No. 57 ("Pl. Opp."); Dkt. No. 59 ("Def. Opp.")). Having reviewed the motions, the

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record of the case, and the relevant legal authorities, the Court GRANTS several of the motions, and DENIES the others, as set forth in this order.

II. LEGAL STANDARD

“A motion in limine is a procedural mechanism to limit in advance testimony or evidence in a particular area.” *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) (citation omitted). By ruling in limine, the court “gives counsel advance notice of the scope of certain evidence” before trial. *Id.* at 1111-12. However, a motion in limine should not be used to resolve factual disputes or weigh evidence. *See C & E Servs., Inc. v. Ashland, Inc.*, 539 F. Supp. 2d 316, 323 (D.D.C. 2008); *Dubner v. City & Cnty. of S.F.*, 266 F.3d 959, 968 (9th Cir. 2001). Evidence should be excluded pursuant to a motion in limine only when it is “inadmissible on all potential grounds.” *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004).

III. DISCUSSION

A. Plaintiff’s Motions in Limine

1. Motion to Preclude Argument that Rain or Other Weather Conditions are Non-Fortuitous or “General Background Conditions”

Plaintiff moves to bar Defendants from making any argument at trial that wind-driven rain and other similar weather conditions are expected conditions, and therefore not covered perils under the policy. Pl. Mot. at 2-4. Defendants, in response, explain that they do not intend to argue that rain cannot constitute a cause of loss for being, as a general matter, a non-fortuitous (*i.e.*, expected) peril. Def. Opp. at 1-2. Rather, Defendants intend to argue that, “in the particular context of this case, rain should not be regarded as a cause’ of the loss at all” since it simply provided a background source of water that caused damage only after that water seeped into the Condominium. *Id.* at 2-3. According to Defendants, their “general background conditions”

1 argument raises a factual matter as to causation – specifically, when the causal chain resulting in
2 damage first began – which should be reserved for the jury.

3 The Court agrees with Plaintiff, and Defendants do not dispute, that Country should be
4 precluded from arguing that the Condominium’s damage is excluded on the basis that rain is a
5 non-fortuitous peril. As the Court held in resolving the parties’ cross-motions for summary
6 judgment, wind-driven rain is a covered peril under the policies. Dkt. 51 at 9-10. Given the extent
7 to which rain is regularly expected in Washington, any argument that rain constitutes a non-
8 fortuitous peril would, if successful, transform rain from a covered peril into an excluded peril.
9 *See Sunwood Condo. Ass’n v. Travelers Cas. Ins. Co. of Am.*, No. 16-cv-1012, 2017 WL 5499809,
10 at *3 (W.D. Wash. Nov. 16, 2017) (“[The] policy contains no exclusion for rain, and [insurer]
11 cannot create one with a fortuitousness argument.”). Country will not be permitted to ask the jury
12 to rewrite its policy in such a way. Accordingly, Defendants are barred from arguing that rain is a
13 non-fortuitous peril.
14

15
16 On the other hand, the Court will not bar Defendants from arguing that rain, in this case,
17 operated as a “general background condition.” Defendants, by their argument, seek to present to
18 the jury an alternate version of the causal chain that led to the alleged damage – *i.e.*, a chain that
19 began with water seeping into the Condominium’s walls, and not one that began with rain. While
20 Country may not argue that rain is an excluded peril under the policy, it may attempt to persuade
21 the jury that rain, as a factual matter, did not play a role in the causal chain that resulted in the
22 Condominium’s damage. This is a factual question that is properly reserved for the jury.
23 Accordingly, the Court grants Plaintiff’s motion in part, and denies it in part, as explained above.
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1 **2. Motion to Preclude Evidence or Argument that Claims are Barred by**
2 **the Known Loss Defense because the Association Should Have Known**
3 **about the Damage when It Purchased Its Policy**

4 Plaintiff argues that Defendants should not be allowed to argue or present evidence that the
5 Association “should have known” about the Condominium’s damage when it first purchased
6 insurance. Pl. Mot. at 4-5. As the Court has observed, “the known loss doctrine requires an insurer
7 to demonstrate *actual* knowledge of the claimed loss, not merely that an insured *should have known*
8 that repairs would be needed.” Dkt. No. 51 at 6. Plaintiff argues that evidence or argument that it
9 should have known of the damage will confuse or mislead the jury as to the correct standard for
10 the known loss defense, and that such evidence and argument should therefore be excluded under
11 Federal Rule of Evidence 403.

12 Defendants will not be allowed (nor apparently do they intend) to argue that the standard
13 for the known loss defense is that an insured “should have known” about the damage at issue.
14 However, the Court will not exclude Country’s expert opinion testimony that the Association
15 should have known about the damage at issue. Such testimony may bear on the Association’s
16 actual knowledge or otherwise create an inference of actual knowledge. As Defendants succinctly
17 and correctly state, “[e]vidence that the Association should have known something supports the
18 inference that it did know it.” Def. Opp. at 3. Plaintiff’s concern that such testimony could cause
19 confusion about the legal standard on the known loss defense will be addressed by the Court’s
20 instruction to the jury, at the appropriate time, as to the correct standard. Plaintiff’s motion is
21 therefore denied as set forth above.
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24 **3. Motion to Preclude Evidence or Argument that Coverage is Barred by**
25 **the Policy’s Suit Limitation Provision**

26 Plaintiff moves to preclude Defendants from arguing that coverage is barred by the policy’s
two-year suit limitation provision, on the ground that the Association filed suit less than two years

after it purchased the policy.¹ Pl. Mot. at 5. However, the two-year limitation period set forth in the policy does not start to run at the time it is purchased, but “after the date on which the direct physical loss or damage occurred.” Dkt. 25, Ex. D at 22. “In general terms, [] for an ‘after a loss occurs’ clause, the loss occurs – and the limitations period starts – when the loss’s cause ends.” *Eagle Harbour Condo. Ass’n v. Allstate Ins. Co.*, No. 15-cv-5312, 2016 WL 499301, at *2 (W.D. Wash. Feb. 9, 2016). When the cause of the Condominium’s damage ceased is a factual question that must be answered by the jury, and not by the Court on a motion in limine. Accordingly, the Court denies this motion.

4. Motion to Preclude Evidence or Argument Regarding Multiple Occurrences or Deductibles

The policy’s deductible is \$10,000 “per occurrence.” Plaintiff asks the Court to exclude argument or evidence that each “rain event” was a separate occurrence, and thus subject to a separate deductible. Plaintiff argues that under Washington law, “the kind of progressive and incremental damage at issue in this case ‘is treated as a single, continuing occurrence.’” Pl. Mot. at 6 (quoting *Franssen Condo. Ass’n of Apartment Owners v. Country Mut. Ins. Co.*, 2022 WL 10419015, at *10 (W.D. Wash. Oct. 18, 2022)).

The evidence and argument that Defendants apparently intend to advance, however, is not that each *rain event* constitutes a separate occurrence; but that each instance of damage to “discrete areas of eighteen different buildings” constitutes a separate occurrence. Def. Opp. at 4. As another court in this Western District recently observed, “the *number* of relevant occurrences for the purpose of interpreting the per occurrence deductible is different from the question

¹ The suit limitation provision states: “No one may bring a legal action against us under this insurance unless: ... The action is brought within two years after the date on which the direct physical loss or damage occurred.” Dkt. 25, Ex. D at 22

1 of *when* the relevant occurrence happens for the purpose of determining if there is coverage at
 2 all.” *Ridge at Riverview Homeowner's Ass'n v. Country Cas. Ins. Co.*, 2023 WL 22678, at *16
 3 (W.D. Wash. Jan. 3, 2023). The law Plaintiff cites holding that progressive and incremental
 4 damage is a “single, continuing occurrence,” consequently, does not bear on whether Defendants
 5 should be allowed to argue that damage to discrete areas of Plaintiff’s condominium buildings
 6 constitutes separate occurrences for purposes of determining whether the deductible has been
 7 met. The Court will not allow evidence or argument that each “rain event” is a separate
 8 occurrence, and to this extent Plaintiff’s motion in limine is granted. However, Plaintiff has
 9 failed to demonstrate that this exclusion should extend to evidence or argument that damage to
 10 discrete areas of Plaintiff’s buildings constitutes separate occurrences for purposes of whether
 11 the deductible has been met.
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13 **5. Motion to Preclude Evidence or Argument Regarding the “Amento** 14 **Proposal”**

15 Plaintiff asks the Court to exclude Defendants’ proposed Exhibit D17, an August 3, 2018
 16 correspondence from Joel Thornburg of the Amento Group to Plaintiff’s property manager, and
 17 the attached “Consulting & Project Management Proposal” (the “Amento Proposal”). The letter
 18 from the Amento Group, which Plaintiff describes as “an architectural company that also
 19 conducts building envelope investigations,” states in relevant part, “We understand you are
 20 interested in retaining a Consultant to develop a Scope of Repair and provide oversight for a
 21 project to rehabilitate the exteriors of the 18 buildings on the property.” Pl.’s Mot. at 8, n. 4; Ex.
 22 C to Burns Decl. Plaintiff asserts that the proposal was never accepted, and the Amento Group
 23 did not perform any work on Plaintiff’s buildings.
 24

25 Plaintiff argues that the statement quoted above is hearsay, and that none of the hearsay
 26 exceptions apply. Defendants are not attempting to establish, however, what *Thornburg* or the

1 *Amento Group* understood about Plaintiff's interest in retaining a consultant, or indeed, even
2 what Plaintiff's interest in retaining a consultant actually was. The correspondence is dated
3 within weeks of the beginning of Country's policy period. It is, Defendant argues, evidence of
4 what *Plaintiff knew or did not know* about the condition of the buildings at the time it purchased
5 the policy, which is relevant to Defendants' "known loss" defense.

6
7 The Court agrees with Defendants. As noted *supra*, § III.A.2., (regarding "Expert
8 Testimony Concerning the Known Loss Defense"), evidence of the information that was
9 available to Plaintiff (or in this instance, its property manager) regarding the condition of the
10 buildings will tend to make the Plaintiff's actual knowledge of that condition more or less likely.
11 Such evidence certainly includes correspondence regarding a rehabilitation proposal from a
12 building envelope consulting firm. To the extent that Plaintiff's objection is that the letter lacks
13 foundation, that problem presumably can be addressed at trial. If Plaintiff's witnesses have no
14 idea how the Amento Group would have known about any interest Plaintiff may have had in
15 retaining a consultant, they will have the opportunity to so testify. Plaintiff will also be able to
16 present testimony as to whether it reviewed or responded (or did not respond) to the proposal;
17 and to whether it otherwise had knowledge regarding the condition of the buildings at the time
18 the policy was purchased. Nor does the document threaten to cause prejudice or confuse the jury;
19 it is a simply written, straightforward document. Plaintiff's witnesses will have ample
20 opportunity to discuss and explain its significance, or lack of significance, to the jury. This
21 motion in limine is denied.

22 23 24 **6. Motion to Preclude Third-Party Statements in a Reserve Study**

25 Plaintiff seeks exclusion of Defendants' proposed Exhibit D3, a 2011 "Reserve Study"
26 that was a "budget planning tool" concerning the Association's reserves and projected potential

1 expenses. *See* Ex. D to Burns Decl. In its in limine motion, Plaintiff quotes the following
2 portions of the study:

3 The work being done at these buildings is primarily based on active/obvious signs
4 of water damage/rot **with the contractor reporting** the most problematic areas
5 being at interfaces between roof and siding, windows and siding, . . . etc. This is
6 not a comprehensive project repairing/reworking all problematic areas but
7 primarily just the areas that are currently leaking and/or have signs/reports of water
8 intrusion in the recent past

9 We caution that the current type of “spot” repairs will not solve all problems and
10 the association should anticipate work at siding/building envelope areas in the
11 future

12 While we are not factoring funding for window replacement within this study, **we**
13 **spoke with the contractor working on the buildings currently and he expresses**
14 great concern with these windows due to poor waterproofing details

15 *Id.* (emphasis in Pl.’s Mot.). Plaintiff objects in particular to the statements and opinions
16 ascribed to “the contractor,” arguing that the statements of this apparently unknown third
17 party are hearsay.

18 Again, however, Defendants do not intend to introduce the statements in the Reserve Study
19 to prove that the contractor reported certain issues, or to prove the truth of those reports. The
20 statements, Defendants argue, are probative of Plaintiff’s actual knowledge about the condition of
21 the buildings at the time it purchased the policy, which is relevant to Defendants’ known loss
22 defense. As with the Amento Proposal, this exhibit goes to what Plaintiff knew about that
23 condition, and when, and therefor is relevant evidence. Plaintiff’s motion in limine is therefore
24 denied.

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B. Defendants' Motions in Limine

As noted above, Defendants also filed six separate motions in limine. The Court will reserve judgment on two of those motions – to bar the use of (1) the insurance policy at issue, and (2) coverage correspondence between the parties, as exhibits (*see* Def. Mot. at 3, 5-6) – pending a hearing (currently scheduled for February 15, 2023) on the parties' objections to various other trial exhibits. As to Defendants' remaining motions, the Court resolves them below.

1. Motion to Bar Evidence of Past Settlements by Plaintiff or Country Mutual

Defendants seek to bar Plaintiff from introducing evidence of Country's settlement of similar disputes in the past, arguing that it would pose unfair prejudice and require Country to waste time explaining the differences between previous settled cases and the present case. Def. Mot. at 3-4. Plaintiff, in response, explains that it "will only offer evidence that the cases were settled and will not get into any details with respect to settlement." Pl. Mot. at 5, n.4. According to Plaintiff, evidence of past settlements is probative of Country's bad faith – *i.e.*, in denying the Association's insurance claim – insofar as such evidence demonstrates that Country "denies all wind-driven rain claims and then subsequently settles them." Pl. Opp. at 3-5.

The Court finds that evidence of Country's past settlements is of tenuous relevance to Plaintiff's bad faith claim. Furthermore, any probative value of that evidence is substantially outweighed by the danger of unfair prejudice to Country, and the jury being misled, as is excludable under Rule 403. In particular, evidence of Country's past settlements may easily (and inappropriately) signal to the jury, which would have no understanding of those cases or the reasons they settled, that the Association's coverage claim should also have merit. Moreover, any attempt by Defendants to confront that evidence – which, as they point out, would inevitably involve litigating the distinctions between the allegedly similar cases and this lawsuit – would lead

1 to a time-consuming and wasteful sideshow. The Court, therefore, will preclude Plaintiff from
2 introducing evidence of Country's past settlements. Defendants' motion is granted.

3 **2. Motion to Bar Evidence or Argument about Court Decisions or Case**
4 **Outcomes in Other Insurance Cases**

5 Defendants ask the Court to bar Plaintiff from introducing evidence or making arguments
6 about prior court decisions or outcomes in other insurance cases, contending that doing so would
7 require the parties to "engage in a proxy battle" using other case outcomes to make their arguments.
8 Def. Mot. at 4. In response, Plaintiff explains that it only intends to rely upon recent summary
9 judgment orders issued in two other lawsuits to demonstrate that Country acted in bad faith by
10 denying the Association's claim despite those decisions, which interpreted certain policy
11 provisions in the plaintiff's favor. Pl. Opp. at 6-7.

13 As an initial matter, the Court finds that Plaintiff's proposed use of those orders is
14 excludable under Rule 403 for the same reasons as its proposed use of Country's past settlements.
15 *See supra* § III.B.1. Moreover, the orders Plaintiff cites – *Franssen Condo. Ass'n of Apartment*
16 *Owners v. Country Mut. Ins. Co.*, No. 2:21-cv-00295, 2022 WL 10419015 (W.D. Wash. Oct. 18,
17 2022) and *Ridge at Riverview Homeowner's Ass'n v. Country Cas. Ins. Co.*, No. 21-cv-00950,
18 2023 WL 22678, at *1 (W.D. Wash. Jan. 3, 2023) – were issued well after Country Mutual denied
19 the Association's claim in December 2020. *See* Dkt. 25, Ex. C. As such, those orders do not bear
20 on whether Country acted in good faith in this matter, as Country could not have known about
21 them when it denied the Association's claim. Accordingly, the Court finds that those orders lack
22 relevance, and that their use at trial would be unfairly prejudicial and wasteful of the Court's and
23 jury's time. The Court therefore grants Defendants' motion.
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1 **3. Motion to Bar Argument Suggesting that the Court Ruled for or**
2 **Against a Party in Pretrial Motions**

3 Defendants seek to preclude Plaintiff from making arguments suggesting that the Court
4 ruled for or against a party in any pretrial motion, arguing that such references have no relevance
5 and can only cause unfair prejudice to Country. Def. Mot. at 5. In response, Plaintiff contends that
6 it intends to make such arguments only “because Country Mutual refuses to agree to jury
7 instructions that follow the Court’s rulings,” as to the scope of coverage, in resolving the parties’
8 cross-motions for summary judgment. Pl. Opp. 7-8. Plaintiff’s argument is frivolous. Any party’s
9 reference to having prevailed on a specific legal issue on summary judgment has no relevance at
10 trial and would unfairly prejudice the other party. At the appropriate time, the Court will issue jury
11 instructions that conform to its summary judgment rulings, regardless of whether Country agrees
12 to those instructions. The Court, therefore, grants Defendants’ motion.
13

14 **4. Motion to Bar Evidence of Other Damages Under the CPA or IFCA**

15 Defendants ask the Court to preclude Plaintiff from introducing evidence of damages on
16 its CPA and IFCA claims other than enhanced damages, and attorney’s fees and costs, provided
17 under those statutes. Def. Mot. at 5. Defendants contend that Plaintiff, in its initial disclosures
18 and pre-trial statement, identified only those damages categories, such that Plaintiff should not be
19 able to pursue a new damages category at this late stage. *Id.* at 5. In response, Plaintiff states that
20 it is only seeking those already identified damages. Pl. Opp. at 8-9. As such, Plaintiff does not
21 appear to oppose this motion. The Court, agreeing with Defendants in any event, grants the motion.
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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS and DENIES Plaintiff's and Defendants'
3 motions in limine as set forth in this order.

4 SO ORDERED.

5 Dated: February 10, 2023.

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Barbara Jacobs Rothstein
9 U.S. District Court Judge